85-656

No.

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

Secretary of State of the State of Washington,
RALPH MUNRO,

Appellant,

v.

SOCIALIST WORKERS PARTY, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is the State of Washington's statutory requirement that a candidate for partisan office must receive 1% of the votes cast for that office in the primary election[1] in order to appear on the general election ballot a violation of the First and Fourteenth Amendments to the United States Constitution?

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[1]Washington has a "blanket primary", in which each primary ballot includes all parties and candidates, and each voter may vote for any candidate. There is no party registration of voters in Washington.

PARTIES

Appellant Ralph Munro is the Secretary of State of the State of Washington. Appellees are the Socialist Workers' Party and Louise Pittell, LeRoy Watson and Dean Peoples, identified in the Complaint as Washington voters, members and a candidate of that party.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 765 F. 2d 1417 (1985) and reproduced as Appendix A.

The opinion of the United States District Court, Western District which is unreported is reproduced as Appendix C.

JURISDICTION

This appeal is taken from an opinion and judgment of the Court of Appeals for the Ninth Circuit which held unconstitutional Wash. Rev. Code 29.18.110 but only with

reference to statewide offices. That Washington election statute requires a candidate for partisan office to receive 1% of the votes cast for that office in the primary election to appear as a candidate on the general election ballot six weeks later.

The Court of Appeals reversed a decision of the District Court for the Western District of Washington which had rendered a Summary Judgment upholding the 1% requirement.

Jurisdiction of the district court was invoked pursuant to 28 U.S.C. 1331, 1343 and 1357. Jurisdiction of the Court of Appeals was exercised under 28 U.S.C. 1291.

The Court of Appeals judgment was entered 17 July, 1985 and is appended (App. B). No rehearing was sought.

A notice of appeal was filed in the Court of Appeals on 8 October 1985 and is appended (App. E). Jurisdiction in this Court is conferred by 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 4 of the United States Constitution:

> §4 ELECTION OF SENATORS AND REPRESENTATIVES. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; * * *

First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacibly to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, § 1 of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code 29.18.110 reads as follows:

> No name of a candidate for a partisan office shall appear on the general election ballot unless he receives a number of votes equal to at least one percent of the total number cast for all candidates for the position sought: *Provided*, That only the name of the candidate who receives a plurality of the votes cast for the candidates of his party for any office shall appear on the general election ballot.

STATEMENT OF THE CASE

A. Introduction—The State of Washington's Election System:

The state of Washington conducts its election system with a greater opportunity for participation by independent candidates and minor party candidates than most other states' systems. Such candidates can be nominated by a small number of voters[2] and then appear on the September blanket primary election. For any candidate to appear on the November general election ballot, the candidate must have received at least 1% of the vote cast for the office at the September election. It is that 1% requirement which the court below invalidated, but only with reference to statewide offices.

The election process in Washington formally commences with the filing of declarations of candidacy, in the third week of July. The next step is the primary, which is held the third Tuesday in September (Wash. Rev. Code 29.13.070). The third and final step is the general election on the first Tuesday after the first Monday in November (Wash. Rev. Code 29.13.010). Thus the time between these two elections is six to seven weeks.

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[2]For the 1986 and 1988 elections, only 194 are required for a statewide office in a state with a population of approximately 4.3 million.

Washington's primary election is a "blanket" primary. That is; the voters are not required to register by political party or select a party ballot. Washington voters at the primary election are thus not confined to voting for the candidates of just one political party but instead may vote for *any* candidate for *any* office on the ballot. But the voter can, of course, only vote once for each office. Thus, he or she can vote, in the same primary election, for a Republican candidate for the U.S. Senate, a Socialist Worker candidate for the U.S. House of Representatives, a Democratic Governor, and so on down the ballot.

B. **Qualifying For The Election Ballot.**

Candidates for partisan office on the September primary ballot are either "major party", "minor party" candidates or "independents".

A party qualifies as a "major party", if one of its candidates has received at least 5% of the total vote for any statewide office in the previous general election (Wash. Rev. Code 29.01.090). All other parties are classified as "minor".

Those wishing to run for office as major party candidates are placed on the September primary if they file a declaration of candidacy, and indicate their party and the office they seek. (Wash. Rev. Code § 29.18.020-030). Those wishing to run for office as minor party candidates must utilize a convention process.

A minor party forms itself and nominates candidates, to be placed on the same September primary ballot, through the convening of a 'convention'. That convention, which takes place in late July or early August must be attended by one voter for each 10,000 persons who voted in the last presidential election in the district or jurisdiction in question (Wash. Rev. Code 29.24.030). This means, for example, that only 194 voters need attend a convention of a minor party to nominate a candidate for statewide office in Washington, based on the 1984 presidential election.[3]

[3]The statewide number was 178 during the years the case below was under litigation, based upon the 1980 presidential election.

Independent candidates are nominated also through the same convention process. However, the convention for independent candidates, rather than forming a party, has as its sole function the nomination of the candidate.

All the candidates for partisan office, be they major party, minor party, or independent candidates, are then placed on the September primary ballot (Wash. Rev. Code 29.18.020) along with candidates for any nonpartisan offices.

After the primary, only those candidates who receive 1% of the vote for that office in the primary will remain on the general election ballot, be they major party, minor party, or independent candidates. (Wash. Rev. Code 29.18.110). As previously indicated, it is this requirement which the court below held unconstitutional, as applied to minor party candidates for statewide office.

The foregoing has been Washington's election system since 1977. Prior to that, "minor" party candidates bypassed the September primary election.[4] However, the convention utilized to select minor party candidates was required to be held on the same day as the September primary, and the convention participants had to forego the opportunity to vote in that primary election. The candidates selected by that convention were automatically placed on the November general election ballot.

C. **Participation of Minor Parties and Independents Under the Washington System.**

Since the 1977 change in Washington election laws, the number of minor parties and independent candidates (for statewide and non-statewide offices combined) appearing on the September primary election and the November general election have been as follows:

[4]Before 1977, candidates on a primary were required to receive 5% of the votes to remain on the ballot for the general election. That requirement did not affect minor party candidates who were not then on the primary ballot.

	September Primary/ Minor Party Candidates	September Primary/ Independent Candidates	November General/ Minor Party Candidates	November General/ Independent Candidates
1978	11	2	8	2
1980*	11	2	8	2
1982	13	5	12	5
1984*	11	5	9	4

*The 1980 and 1984 figures do not include Presidential candidates who only appear on the November general election ballot. In 1980 there were nine presidential candidates and ten in 1984.

The foregoing illustrates that minor party candidates and independents have enjoyed considerable success in having candidates on the state election ballots, *and* also in qualifying for inclusion in the November general election. That success has been somewhat less with respect to the statewide offices, as contrasted with non-statewide offices. In the November general election, the 1% for qualification to appear on the ballot required from 7,700 to 9,140 votes[5] related to the votes cast for the various statewide offices in 1980. The number varies because of a fall-off from the number of votes cast for Governor down to the considerably fewer votes cast for Commissioner of Public Lands).

The Supervisor of Elections statement with respect to that success was that:

> The Socialist Workers Party, Libertarian Party, and Free Peoples Party have had little difficulty meeting the requirements for formation of a party and little difficulty placing candidates for congressional and legislative office on the state general election ballot, but they have not been successful at qualifying candidates for the state general election ballot for statewide offices, such as U.S. Senate.

Affidavit of Donald F. Whiting, Exhibit A, p. 5.[6]

[5]Based on Washington's last primary election.

[6]Quoted only in part by the court below. See, App. A-4.

In the 1984 election which immediately preceded oral argument in the Circuit Court, sixteen minor and independent candidates appeared on the September primary. Thirteen qualified for the November general, including the socialist Workers' candidate for United States Congress.[7]

D. History of This Litigation

Elections were conducted in Washington pursuant to this system since 1977 except for a special situation in 1983. On September 1, 1983, one of Washington's U.S. Senators died and the legislature in a special session created a special October primary for that office, it being too late to incorporate the election of that office into the September primary election. The Socialist Workers Party held a convention and chose Appellee Peoples as its candidate. He was the only minor party or independent nominee in that senatorial election process. Mr. Peoples appeared on the special October primary ballot along with the numerous major party nominees. At the special October primary election he received only 596 votes (less than 1/10 of the required 1% of the 681,690 total vote cast). Thus he was not included on the November general election ballot.

The Socialist Workers Party then filed the instant action in federal district court challenging the constitutionality of Wash. Rev. Code 29.18.110, which contained the 1% primary vote requirement to appear on the general election ballot. The challenge was recited to be based primarily on the First and Fourteenth Amendment. The district court denied relief, and ultimately granted summary judgment to the State, thus upholding the constitutionality of the Washington election system and the 1% requirement in particular.

On appeal, the Socialist Workers Party continued it's challenge to the 1% requirement on the same constitutional grounds. The circuit court below found the 1% requirement to be constitutionally invalid for statewide

[7]A supplement (to the record) was filed (Certificate of the Secretary of State).

offices on the grounds urged by the Party, and reversed the District Court.

The court below held Wash. Rev. Code 29.18.110 unconstitutional for statewide offices because it found that the 1% requirement contained therein:

> * * * deprives minor parties of a reasonable chance to place candidates on the ballot, and thus deprives citizens of Washington of the opportunity to organize, campaign and vote outside the framework of the dominant political parties. * * *

Appendix A-9.

The circuit court viewed the 1% requirement as bringing about "* * * the virtually complete exclusion of serious-minded minor parties* * *". Appendix A-8. After so viewing its effect, the court found that requirement to be a violation of the First and Fourteenth Amendments.

THE FEDERAL QUESTION IS SUBSTANTIAL

A. **Introduction**

The issues presented by this appeal are substantial. Washington asserts the right of a state to regulate its primary and election process through an election system designed to balance a number of competing and legitimate interests.

This Court has identified the major interest which the Petitioner here asserts and which the court below has erroneously disregarded.

> The State has the right to require candidates to make a preliminary showing of substantial support, to qualify for a place on the ballot, bacause it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.

Anderson v. Celebrezze 466 U.S. 780, 788 (1983).

And as stated in *Jenness v. Fortson*, 403 U.S. 431, 442 (1971):

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

In striking down Washington's effort to require, through its preliminary 1% requirement, "some showing of a significant modicum of support", the court below has completely upset the balance which this Court's decisions have allowed other states to strike.

What the Socialist Workers Party is actually asserting is a virtually unrestricted access to the general election ballot without any preliminary showing of a modicum of support in the primary. And the court below gave the party exactly that, at least with respect to state-wide offices. Further, the court below has reduced the right of a State to require such a preliminary showing to an empty shell. If the exercise of that right has the effect of actually limiting the number of minor party candidates in the general election to a significant extent, then that right is lost to the State, never to be regained. And this is so regardless of whether or not the parties which fail to qualify their candidates for the general election have been "reasonably diligent" in trying to do so. *Storer v. Brown*, 415 U.S. 724, 742 (1974).

The court below has effectively held, as a matter of federal constitutional law, that requiring a specified showing of voter support in the primary election to screen candidates from the general ballot is unlawful. Though the statute in question was 1%, the Circuit Court's analysis appears to extend to any threshhold percentage which has the intended effect of screening out candidates with *de minimis* support. Both the result and the basic approach of the court below should be reviewed by this Court.

B. **The Purpose and Effect of the 1% Requirement**

Under Washington's election system, a minor party which wishes to run a candidate in a state-wide election is virtually guaranteed access to the State's voters. All it

needs to do is obtain the attendance of a handful of registered voters at its convention, with the result that the candidate will be automatically placed on the primary ballot. What is not guaranteed, however, is the right of a second chance, through automatic placement on the general election ballot. That second chance can be obtained only by meeting the 1% requirement.

A party could fail to meet this 1% requirement and thereby fail to gain a "modicum of support" for several reasons. One may be that the party and its candidate simply did not work hard enough, and thus were not "reasonably diligent" in the primary. *Storer*, *supra*, 415 U.S. at 742. Another reason may be that the voters found the party and its candidate unappealing, no matter how hard they worked to persuade the voters otherwise.

That a minor party which campaigns with reasonable diligence and fields attractive candidates can meet the 1% requirement is clear from the record in this case. As already shown, minor parties have had considerable success since 1977 in meeting the 1% requirement and thereby remaining on the general election ballot in congressional and other local races. See p. 6, *supra*. But the court below ignores this fact. Instead, it focuses solely on the fact that minor parties have had less success in state-wide races. And for this the court below condemns Washington's system, with its 1% requirement. The court gives no weight whatsoever to what are, in all likelihood, the real reasons for this lower degree of success on the state-wide level.

C. The Fundamentally Erroneous Approach Of The Court Below

Apparently because of these differing degrees of success on the state and local levels, the court below invalidated the 1% requirement only as applied to state-wide elections. As applied to races which are not state-wide, the 1% requirement remains intact. And this is so despite the fact that in the Complaint which commenced this action, and in the Respondents' brief in the court below as well, the 1% requirement was challenged on its face, i.e., as applied to any and all elections, be they state-wide or not.

Thus Washington may no longer have a single, uniform standard for both state-wide and local elections.[8] This is a situation which is itself subject to serious constitutional challenge. See *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, (1979). If the decision below stands, Washington can remedy this situation only by giving up, for local elections, a requirement which is itself perfectly acceptable under the First and Fourteenth Amendments.

Such a result is absurd; but it simply highlights the absurdity of the approach used by the court below in its application of historical data—an approach which in effect says: "If the 1% requirement has any substantial effect, then it will be held to be unconstitutional."[9]

In addition to its misuse of history, the court below completely ignored several critical features of Washington's system. The first is the nature of a "blanket" primary. In States with either an "open" or a "closed" primary, the voter selects candidates from only one party. For a party which does not field an entire slate of candidates, for all offices, this would present to the voter a strong incentive to avoid that party's candidates completely. For if he chooses that party, he thereby precludes himself from voting for candidates for all offices.

At least in Washington, minor parties typically do not field an entire slate. The Socialist Workers Party in 1984 provided a striking example of this—it placed on the pri-

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[8]On remand, the district court entered a judgment for plaintiffs (appellees here) pursuant to the Circuit Court decision.

[9]The absurdity can perhaps be best illustrated by an example. Assume two states, A and B, each having an election system identical to Washington's. Assume also that over a given period, e.g., 10 years, during which that system was in place, minor party candidates were on primary ballot twenty times in each state. But also assume that for whatever reason, only two of the candidates survived to the general election in State A, while in State B only two *failed* to survive to the general election. The 1% requirement would be constitutionally acceptable to the court below for State B, but invalid for State A. But such differing results would be, we suggest, constitutional nonsense, though they would be required by the approach of the court below.

mary ballot a candidate for governor and a candidate for one congressional position, but none for any other positions. If Washington had "open" or "closed" primary, the voter wishing to elect the Socialist Workers' candidates for Governor and for Congress would be precluded from selecting candidates for any other positions. This would obviously be a strong incentive to refuse to vote for the Socialist Workers' candidates at all; and that incentive, in turn, would make the 1% requirement much more difficult for the candidates to meet. But in Washington's blanket primary, no such incentive to avoid minor party candidates exists. Every voter in the primary election can vote for Socialist Workers' candidates without fear of tossing away his opportunity to select candidates for other positions.

This feature of the Washington system, along with others, was ignored by the court below in its efforts to distinguish *Jenness v. Fortson*, 403 U.S. 431 (1971) and *American Party of Texas v. White*, 415 U.S. 767 (1974), the principal cases on which we rely.

In *Jenness*, this Court approved a Georgia system which required independent candidates seeking a place on Georgia's general election ballot to gather nominating petitions signed by 5% of the registered voters in the last election for the office being sought. In *American Party*, the Texas system there approved was similar, though the required percentage was only 1%.

The following table compares the Georgia and Texas systems with Washington's, using 1984 Washington voter figures for the Governor's race.

Total Washington Voters	Washington/General Vote For Governor	Washington/ Primary Vote for Governor
2,457,667	1,888,987	914,000
x 5% Approved in Jenness	x 1% Approved in American Party	x 1% (invalidated) by court below
122,883	18,890	9,140

Yet the court below called Washington's 1% requirement "more difficult to meet". App. A-8. Why the 9,140 primary votes called for under Washington's 1% requirement would be more difficult to obtain than the 122,883 called for under *Jenness* or the 18,890 called for under *American Party* is baffling. But the court below did not shrink from justifying its conclusion that such was the case.

It emphasized that "* * * a primary vote system for a minor party nominee has the inherent effect of establishing a relatively early deadline", thereby preventing independent-minded voters from basing their choice on subsequent events. App. A-8. But this completely overlooks the fact that the deadlines for gathering signatures under the Georgia and Texas systems were much *earlier* than the deadline established by Washington's primary election. In *Jenness*, the deadline was the second Wednesday in June. See 403 U.S at 434, 435. In *American Party*, it was the 30th of June. See 415 U.S. at 778. In Washington, it is the third Tuesday of *September*.

The court below also emphasized that under the Georgia and Texas systems, the necessary signatures could be obtained from any registered voters, regardless of whether those votes participated in another party primary or not. App. A-8. But this is simply pointing out what is really a similarity with Washington's system, not a difference. Washington's blanket primary allows similar flexibility and openness to the potential supporters of minor party candidates, for the reasons previously explained. See, pp. 11-D, *supra*.

Lastly, the court below faults the Washington system because the 1% requirement can be satisfied only by persons who actually vote in the primary, rather than by registered voters generally. App. A-8. But this problem, if it can actually be called a problem, is self-correcting. To the extent that the voter turnout in the primary decreases, to that same extent the number of votes under the 1% requirement decreases as well.

By failing to follow *Jenness* and *White*, the court be-

low denied to Washington the flexibility enjoyed by other States in establishing the modicum of support to be required of minor party candidates who wish to be placed on the general election ballot.

CONCLUSION

For the reasons given above, probable jurisdiction should be noted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-3806

D.C. No. CV 83-697T

OPINION

Socialist Workers Party; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES, *Plaintiffs-Appellants,*

v.

Secretary of State of the State of Washington, RALPH MUNRO, *Defendant-Appellee*

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and Submitted December 3, 1984 —
Seattle, Washington

Before: BROWNING, Chief Judge, GOODWIN and SKOPIL, Circuit Judges.

BROWNING, Chief Judge:

Plaintiffs filed suit challenging the constitutionality of Wash. Rev. Code section 29.18.110 (West Supp. 1985) on the ground that it effectively barred minor parties from participating in general elections for statewide office and thus deprived these parties, their members, and the voters of Washington of rights protected by the first and fourteenth amendments. Both parties filed motions for summary judgment. The district court gave judgment for defendants. Plaintiffs appealed.

I

Prior to 1977, minor political parties did not participate in Washington's primary election. Each minor party nominated its candidates for public office at a convention, at-

tended by at least one hundred registered voters. Wash. Rev. Code §§ 29.24.020 and 29.24.030 (1965) (amended 1977). The minor party nominee was placed on the ballot for the general election upon the filing of a certificate signed by at least one hundred registered voters present at the party's convention. Wash. Rev. Code §§ 29.24.040 and 29.30.100 (1965) (amended 1977).

Washington amended its election law in 1977. The convention-certificate requirement for nomination of a minor party candidate is retained, but an additional condition is imposed upon minor party access to the general election ballot. The name of the nominee selected by a minor party by the convention-certification procedure is no longer placed directly on the general election ballot but instead is placed on the ballot for the state's primary election. Wash. Rev. Code § 29.28.020 (West Supp. 1985). The primary ballot also includes the names of those persons who have declared their candidacy for nomination by the major parties. The nominee of a minor party or a candidate for nomination of a major party is placed on the general election ballot only if he receives 1% of the total primary vote for all candidates for the particular office, and a plurality of the votes cast for candidates of his party for that office. Wash. Rev. Code § 29.18.110. As a practical matter the first condition affects only minor parties because the vote cast for the two major parties has consistently far exceeded 1% of the total vote. The second condition affects only major party candidates because a minor party is permitted to place on the primary ballot only the single nominee already selected by the convention-certificate process. Wash. Rev. Code §§ 29.18.020, 29.24.020.

II.

The Supreme Court recently restated the analytic process to be followed in resolving first and fourteenth amendment challenges to state election laws:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the

> First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

We turn first to the (1) character and (2) magnitude of the injury to the first and fourteenth amendment rights plaintiffs seek to vindicate.

Plaintiffs contend the primary vote requirement imposed by Wash. Rev. Code section 29.18.110 has substantially barred minor party candidates for statewide offices from the ballot for Washington's general elections since 1977.

Statutes restricting access to the ballot by a party's candidates limit both "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The injury to these fundamental rights is particularly serious where, as here, the burden "falls unequally on new or small political parties," for "[b]y limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 793-94. *See also Clements v. Fashing*, 457 U.S. 957, 964-65 (1982), and cases cited.

It is evident that the infringement upon constitutional rights involved in this case is serious in character. The magnitude of the restraint — the extent to which it has inhibited minor party access to the ballot — is dramatic.

Prior to 1977, candidates of minor parties qualified for the general election ballot in contests for statewide office

with regularity. At least one minor party appeared on the general election ballot in every Washington gubernatorial election from 1896 to 1976 except 1952. Two or more minor party candidates qualified in all but two of these elections. Forty minor party candidates appeared on the general election ballot for statewide offices in the five general elections between 1968 and 1976.

The 1977 amendment to Wash. Rev. Code section 29.18.110 worked a striking change. According to the affidavit of Washington's Supervisor of Elections, since 1977 minor parties "have not been successful at qualifying candidates for the state general election ballot for statewide offices." Although one or more minor parties nominated candidates in each of the four statewide elections held between 1978 and 1983, none qualified for the general election ballot. In 1984 one of four minor party candidates nominated qualified for the general election ballot.

There is some indication that Washington's legislature simply underestimated the adverse impact of the statutory revision upon minor party access to the general election ballot. While the legislation was under consideration, the Office of the Secretary of State addressed a memorandum to the legislators stating that if the proposed legislation had been applicable to the 1976 special election, eight of the twelve parties and fifty of the sixty-five non-presidential candidates in that election would have qualified for the general election ballot. Contrary to this prediction, minor party candidates have been substantially eliminated from Washington's general election ballot.

Washington argues that three "independent" candidates qualified for the general election ballot during this period. But an election scheme that operates to exclude minor parties from the ballot is not acceptable merely because it permits independent candidates access to the ballot. "[T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown*, 415 U.S. 724, 745 (1974).

Washington argues there is no significant difference between independent and minority party candidates in Washington because Washington's single "blanket" primary includes all parties and candidates, and a voter may vote for candidates from different parties for different offices. But the mere fact that the cost of voting for a minor party candidate in Washington is less than it is in states having restricted primaries, does not refute plaintiffs' demonstration that Washington has substantially barred minor parties from the general election ballot.

Washington asserts that voters may express their preference for a minor party candidate by writing-in the candidate's name on the general election ballot. The Washington statute appears to forbid voters from writing-in the name of a minor party candidate who has failed to qualify for a place on the ballot. *See* Wash. Rev. Code § 29.51.170. In any event, the possibilityof writing-in a minor candidate "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson*, 460 U.S. at 799 n.26. *See also Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974).

Washington points to several features of the 1977 revision that arguably benefitted minor parties. Prior to the revision, the statute required minor parties to hold their conventions on the same day as the major party primary, forcing voters to choose between them; under the revision, minor party conventions precede the primary and, as noted earlier, primary voters may vote for a minor party candidate for an office without forgoing the opportunity to vote for candidates of other parties for other offices. In addition, Washington contends, the requirement that minor parties participate in the "blanket" primary improves the opportunity of minor party candidates to appear in candidate forums and otherwise gain public attention. These benefits are insubstantial in the face of the undisputed evidence that the revision as a whole substantially forecloses minor parties from the general election ballot. Moreover, the state does not argue the benefits it extols could not be achieved by less restrictive means.

III.

We turn to an evaluation of the interests offered by the State as justification for the burden imposed by section 29.18.110 upon minor party access to the general election ballot and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

Washington relies primarily upon two interests to justify section 29.18.110: (1) "it ensures that candidates on the general ballot have sufficient community support"; (2) "it helps prevent voter confusion." These are not independent interests. A state may not require a preliminary showing of voter support as an end in itself. Denying ballot access is permissible only if and to the extent that it is necessary as a means to further other legitimate state interests, including avoidance of the voter confusion that may result from the presence on the ballot of too many or frivolous candidates. *Anderson*, 460 U.S. at 788 n.9, and cases cited.

Washington's political history evidences no voter confusion from ballot overcrowding. In the 20 gubernatorial elections in this century prior to the passage of the challenged statute, an average of 4.75 candidates appeared on each general election ballot. The trend was downward in the first 10 elections the average number of candidates was 5.3; in the last 10 the number dropped to 4.2.

No more than eight candidates for the office of Governor have ever appeared on a Washington general election ballot. The number of candidates for other statewide offices was substantially less than the number for Governor in each of the five elections for which detailed returns are included in the record (1968-1976) — no more than four minor parties appeared on the ballot for any statewide position other than governor. *Cf. Williams v. Rhodes*, 393 U.S. 23, 47 (1968) (Harlan, J., concurring) ("[T]he presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion.").

Washington's argument that the general election ballot might be confusingly overcrowded without the restriction imposed by section 29.18.110 is undercut by the state's

tolerance and even encouragement of large numbers of candidates on the primary election ballot, particularly since primary voters may vote for any of the numerous candidates for a particular office regardless of party. The primary ballot for the special election of the United States Senate in 1983 bore the names of 33 office seekers — 18 candidates from the Democratic Party, 14 candidates from the Republican Party, and the single nominee of the Socialist Workers Party. Section 29.18.110 did not reduce the clutter of candidates facing voters in the primary. Its only effect was to reduce the number of names on the general ballot from three to two.

It is also significant that Washington's 1977 ballot access law does not apply to the election of the President and Vice-President, which is typically the most crowded contest on the Washington general election ballot.

Even if there were a problem of overcrowding on Washington's general election ballot, resulting in voter confusion, the remedy adopted by Washington unnecessarily restricts fundamental liberties by "making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates." *Clements*, 457 U.S. at 965 (opinion of Rehnquist, J.). *See also Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-86 (1979); *Storer v. Brown*, 415 U.S. at 746. Such a draconian remedy was not required to protect Washington's general election ballot from overcrowding. Indeed, we can think of no state interest, and the authorities suggest none that would necessitate the virtually complete exclusion of serious-minded minor parties seeking access to the ballot.

Washington relies upon *Jennes v. Fortson*, 403 U.S. 431 (1971), sustaining a requirement that independent candidates seeking a place on Georgia's general election ballot secure nominating petition signatures of 5% of the registered voters in the last election for the office in question; and upon *American Party of Texas v. White*, 415 U.S. 767 (1974), sustaining a 1% petition requirement imposed by Texas law. Both decisions are distinguishable.

Both *Jenness* and *American Party of Texas* involved pe-

tition requirements. Washington's primary vote requirement is more difficult to meet, for two reasons. First, the focus of the primary is usually upon contested races between candidates for the nominations of the major parties, making it more difficult for the already nominated minor party office seeker to attract voter attention. More important, a primary vote system for measuring required public support for a minor party nominee has the inherent effect of establishing a relatively early deadline, preventing independent-minded voters who might be attracted to a minor party nominee from basing their choice on significant events as they develop in the course of a campaign. *See Williams*, 393 U.S. at 33; *Anderson*, 460 U.S. at 796-805; *McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980).

In addition, the burden of *Jenness*'s 5% requirement was ameliorated by the fact that "Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions." *Jenness*, 403 U.S. at 438. Thus any registered voter could sign a petition; he could do so even if he had signed one or more petitions on behalf of other candidates, or had participated, or later did participate, in the primary of another party. *Id.* at 438-39. Similar flexibility was afforded by the statute involved in *American Party of Texas*. As the eighth circuit pointed out, under Texas' statute "new parties are entitled to compete before the primary, to count signatures at a party convention on primary day and to make up any shortage in signatures for fifty-five days after the primary. * * *" *McLain*, 637 F.2d at 1164. Under the Washington statute, in contrast, a greater degree of support must be shown because support may be drawn only from the limited group actually voting in the primary election, excluding potential support from the 40% of the electorate that registers but does not vote.

Only Washington employs the primary device to screen minor party candidates from the general ballot. A Michigan statute similar in terms and exclusionary impact was held unconstitutional in *Socialist Workers Party v. Secretary of State*, 412 Mich. 571, 317 N.W.2d 1 (1982). The Supreme Court's earlier summary affirmance of a 3-judge

district court decision to the contrary, *see Hudler v. Austin*, 419 F. Supp. 1002 (E.D. Mich. 1976), *aff'd sub nom. Allen v. Austin*, 430 U.S. 924 (1977), dealt only with the facial constitutionality of the new Michigan procedures before any election had been conducted. The Michigan Supreme Court's subsequent decision held the statute unconstitutional as applied in light of the exclusion of minor parties from the general ballot in two subsequent elections. *See Socialist Workers Party*, 317 N.W.2d at 4-6.

The question is not whether the new Washington election law has advantages the old law did not. Instead, it is whether the present law deprives minor parties of a reasonable chance to place candidates on the ballot, and thus deprives citizens of Washington of the opportunity to organize, campaign, and vote outside the framework of the dominant political parties. The record before us demonstrates that Washington's ballot access law seriously impinges upon these protected rights. Washington has failed to present an interest substantial enough to warrant the restraint imposed on those rights. We conclude section 29.18.110 is unconstitutional as applied to statewide electoral contests.

We reverse the grant of summary judgment for Washington, and direct the district court to enter summary judgment for the Socialist Workers Party and other appellants.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3806

CV 83-697T

Socialist Workers Party; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES, *Plaintiffs-Appellants,*

v.

Secretary of State of the State of Washington, RALPH MUNRO, *Defendant-Appellee.*

APPEAL from the United States District Court for the District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is reversed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C83-697T

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

SOCIALIST WORKERS' PARTY, ET AL., *Plaintiffs,*

v.

SECRETARY OF STATE OF THE STATE OF WASHINGTON, *Defendant.*

THIS MATTER came on regularly for hearing before the Court on January 12, 1984, on cross-motions for summary judgment pursuant to Civil Rule 56 by Plaintiffs and Defendant. The parties both agreed that there were no disputed issues of material fact to be resolved, and each side asserted that they were entitled to the relief they requested as a matter of law.

Having considered the pleadings, memoranda of law, the affidavits of fact, the exhibits thereon, and the arguments of counsel, and being fully advised, the Court finds that summary judgment is appropriate under Rule 56, and enters the following:

FINDINGS OF FACT

1. This Court has jurisdiction over the parties and the subject matter herein.

2. Plaintiff Socialist Workers Party is a minor political party in the State of Washington, and has active branches in other states. (Plaintiffs' Affidavit of Ivan King, pp. 1, 2)

3. Plaintiff Dean Peoples was the Socialist Workers Party candidate for U.S. Senate in the 1983 election. (Plaintiffs' Affidavit of Dean Peoples, p. 1)

4. Plaintiffs Leroy Watson and Louise Pittell are apparently registered voters of the State of Washington.

5. Defendant Ralph Munro is the Secretary of State of the State of Washington. As the chief election officer of the State, Mr. Munro has supervisory control over elections pursuant to the provisions of Wash. Rev. Code 29.04.070.

6. A vacancy in the U.S. Senate was created by the death of Henry M. Jackson on September 1, 1983.

7. Due to the timing of that vacancy, the legislature was called into special session on September 10, 1983 and enacted a measure calling for a special primary election on October 11, 1983. (Plaintiffs' Affidavit of Lisa Hickler, p. 3)

8. Plaintiff Dean Peoples was chosen as the candidate of the Socialist Workers Party at a street corner convention conducted on September 16, 1983. (P-1 article Sept. 17, 1983, appended to Plaintiffs' Affidavit of Lisa Hickler)

9. The office of the Secretary of State verified the necessary number of signatures on the certificate of nomination submitted by the Socialist Workers Party, and certified the name of Dean Peoples to appear on the primary election ballot. (Defendant's Affidavit of Donald F. Whiting, p. 2)

10. Dean Peoples received 596 votes in the special primary election conducted on October 11, 1983. (Defendant's Affidavit of Donald F. Whiting, p. 5)

11. The number of votes cast in the special October 11th primary was 681,690. (Defendant's Affidavit of Donald F. Whiting, p. 5)

12. Plaintiff Dean Peoples did not receive enough votes in the primary election to qualify for placement on the general election ballot. (Defendant's Affidavit of Donald F. Whiting, p. 5; Wash. Rev. Code 29.18.110)

13. Plaintiffs instituted this action and sought a show cause hearing on why a preliminary injunction requiring defendant to print the name of Dean Peoples on the general election ballot should not be granted.

14. The show cause hearing was conducted October 26, 1983 and the preliminary injunction request was denied.

15. Wash. Rev. Code 29.18.110, requires candidates for partisan office to obtain one percent of the vote at the

primary election in order to have the candidate's name printed on the general election ballot.

16. Wash. Rev. Code 29.12.110 is part of a minor party election process last amended in 1977.

17. In 1983 the U.S. Senate vacancy was the only partisan state-wide office on the ballot. Only one minor party, the Socialist Workers Party, attempted to place a candidate on the ballot.

CONCLUSIONS OF LAW

1. Insofar as a Finding of Fact may constitute a Conclusion of Law, it is hereby adopted as such.

2. This Court has jurisdiction over the parties and over the subject matter herein, pursuant to Title 28 U.S.C. secs. 1331, 1343, and 1357.

3. The issue presented to this Court is whether rights granted by either the First or Fourteenth Amendment to the U.S. Constitution are violated by the requirement of Wash. Rev. Code 29.18.110.

4. Plaintiffs do not challenge the constitutionality of Wash. Rev. Code 29.18.110 on its face, but only challenge that statute as it applies to minor political parties, specifically the Socialist Workers Party.

5. The standard used to review the challenged statute in ballot access cases hinges upon whether the interests involved are "fundamental." Not every restriction imposed by the states on ballot access is subject to strict scrutiny. *Anderson v. Celebrezze*, 458 U.S. ____, 103 S. Ct. at 1564, 1569, 75 L. Ed. 2d 547 (1983).

6. If the interests are deemed to be fundamental, the state must show the classification is necessary to serve a compelling interest, If, however, the interests are not fundamental, minimum scrutiny is used to determine whether the statute has a rational relationship to a legitimate State interest. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990 59 L. Ed. 2d 230 (1979).

7. The direct impact of Washington's 1% requirement falls upon aspirants for office. Plaintiffs' purpose in filing

this suit was to seek to have the name of the Socialist Workers Party candidate printed on the general election ballot.

8. The right of candidacy has not been recognized by the United States Supreme Court as a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 142-143, 92 S. Ct. 849, 855 31 L. Ed. 2d 92 (1972).

9. Since the right of candidacy is not fundamental, strict scrutiny is not appropriate in this case. The defendant Secretary of State need only show that Wash. Rev. Code 29.18.110 is rationally related to a legitimate state interest.

10. The United States Supreme Court has identified various legitimate interests that a state has in regulating ballot access and has determined that a state has a legitimate interest in requiring a candidate to demonstrate a "significant modicum of support" within the voting community. *Jenness v. Fortson*, 403 U.S. 431, 442 91 S. Ct. 1970, 1976, 29 L. Ed. 2d 554 (1971).

11. The State of Washington, therefore, has a legitimate interest in regulating ballot access to those candidates who have shown they have a "significant modicum" of public support.

12. Wash. Rev. Code 29.18.110 is a rational means of achieving the legitimate State interest of forcing candidates to demonstrate some measure of public support.

ALTERNATIVE STANDARD OF REVIEW

13. Although the right of candidacy has not been declared to be a "fundamental" interest, the Supreme Court has indicated that the "right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish*, 415 U.S. 709, 716 (1974), 94 S. Ct. 1315, 1320, 39 L. Ed. 2d 702 (1974).

14. Assuming the right to candidacy is a fundamental right, defendant Secretary of State has shown that Wash. Rev. Code 29.18.110 is necessary to serve a compelling State interest.

15. The Supreme Court, under the strict scrutiny test, has required a challenged statute to be the least drastic means to achieve the desired ends. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 185, 99 S. Ct. at 991.

16. The enacted version of the 1977 amendments was less restrictive than the pre-amendment minor party nominating procedure. The amended version removed all restrictions on the right to vote. Primary voters are now free to vote for any candidate for an office, regardless of whether they attended a minor party nominating convention. Under the pre-amendment version, primary voters who attended a minor party convention were prohibited from voting for any partisan positions on the ballot.

17. Moreover, Wash. Rev. Code 29.18.110 does not operate to completely bar a minor party candidate from the general election ballot if the candidate did not receive one percent of the vote in the primary. That candidate still has access to the general election ballot via the write-in provisions of Wash. Rev. Code 19.51.170.

18. Wash. Rev. Code 29.18.110 is the least drastic means of accomplishing the State's compelling interest.

19. Wash. Rev. Code 29.18.110 does not violate rights guaranteed by either the First or Fourteenth Amendments to the United States Constitution.

Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED.

DATED this 28th day of March, 1984.

/s/ JACK E. TANNER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C83-697T

JUDGMENT

SOCIALIST WORKERS PARTY, ET AL., *Plaintiffs,*

v.

SECRETARY OF STATE OF THE STATE OF WASHINGTON, *Defendant.*

This action came on for hearing before the court, United States District Judge Jack E. Tanner presiding. The issues having been duly heard and a decision having been duly rendered, it is order and adjudged _____

Defendant's motion for Summary Judgment is GRANTED, and Plaintiff's motion for Summary Judgment is DENIED.

DATED this 28th day of March, 1984.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-3806

NOTICE OF APPEAL

SOCIALIST WORKERS PARTY, ET AL.,
Plaintiffs-Appellants,

v.

Secretary of State of the State of Washington,
RALPH MUNRO, *Defendant-Appellee.*

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Ralph Munro, Secretary of State of the State of Washington, hereby appeals to the Supreme Court of the United States from the July 17, 1985 Opinion and Judgment of the Court of Appeals for the Ninth Circuit, that opinion reversing the decision of the United States District Court for the Western District of Washington.

This appeal is taken pursuant to 28 U.S.C. 1254(2).

DATED this 8th day of October, 1985.

/s/ KENNETH O. EIKENBERRY
Attorney General

/s/ JAMES M. JOHNSON
Senior Assistant
Attorney General

Counsel for Defendant/Appellee
Temple of Justice AV-21
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(206) 753-4556

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-3806

CERTIFICATE OF SERVICE

SOCIALIST WORKERS PARTY, ET AL.,
Plaintiffs-Appellants,

v.

Secretary of State of the State of Washington,
RALPH MUNRO, *Defendant-Appellee.*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing NOTICE OF APPEAL to the Supreme Court of the United States has been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed this 8th day of October, 1985, to:

Daniel Hoyt Smith
Smith & Midgley
Attorneys for Plaintiffs/Appellants
2200 Smith Tower
Seattle, Washington 98104

/s/ SHARON A. MORROW
Bruce Rifkin, Clerk
U.S. District Court,
Western District of
Washington
P.O. Box 1935
Tacoma, WA 98401

SUBSCRIBED TO AND SWORN TO before me this 8th day of October, 1985.

/s/ J. M. JOHNSON
Notary Public in and
for the State of
Washington, residing
at Olympia.